

INDEX

	Page
Opinion below.....	1
Jurisdiction.....	1
Questions presented.....	2
Statute involved.....	2
Statement.....	3
Argument.....	15
Conclusion.....	26

CITATIONS

Cases:

<i>Allis v. United States</i> , 155 U. S. 117.....	20
<i>Baker v. United States</i> , 21 F. (2d) 903, certiorari denied, 276 U. S. 621.....	22
<i>Bannon v. United States</i> , 156 U. S. 464.....	17
<i>Coldwell v. United States</i> , 256 Fed. 805, certiorari denied, 250 U. S. 661.....	20, 21
<i>Debs v. United States</i> , 249 U. S. 211.....	20
<i>Delaney v. United States</i> , 263 U. S. 586.....	19
<i>Galatas v. United States</i> , 80 F. (2d) 15, certiorari denied, 297 U. S. 711.....	18
<i>Glasser v. United States</i> , 315 U. S. 60.....	16, 21
<i>Hallock v. United States</i> , 185 Fed. 417, certiorari denied, 220 U. S. 613.....	21
<i>Hamburg-American Steam Packet Co. v. United States</i> , 250 Fed. 747, certiorari denied, 246 U. S. 662.....	16
<i>Herman v. United States</i> , 257 Fed. 601, certiorari denied, 251 U. S. 558.....	20
<i>Howenstine v. United States</i> , 263 Fed. 1.....	20
<i>Kirchner v. United States</i> , 255 Fed. 301, certiorari dismissed, 250 U. S. 678.....	21
<i>Laska v. United States</i> , 82 F. (2d) 672, certiorari denied, 298 U. S. 689.....	22
<i>Marino v. United States</i> , 91 F. (2d) 691, certiorari denied sub nom. <i>Gullo v. United States</i> , 302 U. S. 764.....	22
<i>Marx v. United States</i> , 86 F. (2d) 245.....	18
<i>McDonald v. United States</i> , 89 F. (2d) 128.....	22
<i>Meyers v. United States</i> , 94 F. (2d) 433, certiorari denied, 304 U. S. 583.....	18
<i>Montgomery, Ex parte</i> , 244 Fed. 967, affirmed, 246 U. S. 656.....	23

II

Cases—Continued.

	Page
<i>Partridge v. United States</i> , 39 App. D. C. 571.....	21
<i>Polski v. United States</i> , 33 F. (2d) 686, certiorari denied, 280 U. S. 591.....	25
<i>Schoborg v. United States</i> , 264 Fed. 1, certiorari denied, 253 U. S. 494.....	20
<i>Shidler v. United States</i> , 257 Fed. 620.....	20
<i>Stenzel v. United States</i> , 261 Fed. 161.....	20
<i>Sonzinsky v. United States</i> , 300 U. S. 506.....	25
<i>Sorrells v. United States</i> , 287 U. S. 435.....	24, 25, 26
<i>United States v. Manton</i> , 107 F. (2d) 834, certiorari denied, 309 U. S. 664.....	18, 21, 22
<i>United States v. Pelley</i> , 132 F. (2d) 170, certiorari denied, February 15, 1943, Nos. 645-647, this Term.....	20
<i>United States v. Rabinowich</i> , 238 U. S. 78.....	17
<i>Van Riper v. United States</i> , 13 F. (2d) 961, certiorari denied sub nom. <i>Ackerson v. United States</i> , 273 U. S. 702.....	22
<i>Viereck v. United States</i> , 130 F. (2d) 945, reversed on other grounds, March 1, 1943, No. 458, this Term.....	20
<i>Warszower v. United States</i> , 312 U. S. 342.....	19
<i>Williamson v. United States</i> , 207 U. S. 425.....	20, 21
<i>Wood v. United States</i> , 16 Pet. 342.....	21

Statute:

<i>Act of June 15, 1917, Title I, 40 Stat. 217, 218, 219 (50 U. S. C. 32, 34):</i>	
Sec. 2 (a).....	2
Sec. 4.....	3

In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 1052

KURT EMIL BRUNO MOLZAHN, PETITIONER

v.

UNITED STATES OF AMERICA

**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE SECOND
CIRCUIT**

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 689-703 has not yet been reported.

JURISDICTION

The judgment of the circuit court of appeals was entered April 22, 1943 (R. 724), and a petition for rehearing (R. 104-720) was denied the same date (R. 722).¹ The petition for a writ of certiorari was filed May 27, 1943. The jurisdiction of this Court is invoked under Section 240

¹ The opinion of the court had been entered April 2, 1943 (R. 688).

(a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

1. Whether there is sufficient evidence to support the jury's finding that petitioner was a party to the conspiracy charged in the indictment.

2. Whether the trial court erred in admitting testimony concerning (a) statements made by petitioner approximately three and one-half years prior to the period of the alleged conspiracy while he was on a trip to Germany, and (b) conversations among his alleged co-conspirators to which he was not a party; and whether there was error in admitting certain letters written by one of the alleged co-conspirators on the ground that the conspiracy had then terminated.

3. An additional question discussed in the petition, but which was not assigned as error or considered by the court below, is whether the case presents an issue of entrapment.

STATUTE INVOLVED

Sections 2 (a) and 4 of Title I of the Act of June 15, 1917, 40 Stat. 217, 218, 219; 50 U. S. C. 32, 34, provide in pertinent part as follows:

SEC. 2. (a) Whoever, with intent or reason to believe that it is to be used to the injury of the United States or to the ad-

vantage of a foreign nation, communicates, delivers, or transmits, or attempts to, or aids or induces another to, communicate, deliver, or transmit, to any foreign government, or to any faction or party or military or naval force within a foreign country, whether recognized or unrecognized by the United States, or to any representative, officer, agent, employee, subject, or citizen thereof, either directly or indirectly, any document, writing, code book, signal book, sketch, photograph, photographic negative, blue print, plan, map, model, note, instrument, appliance, or information relating to the national defense, shall be punished by imprisonment for not more than twenty years: * * *

SEC. 4. If two or more persons conspire to violate the provisions of sections two or three of this title, and one or more of such persons does any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be punished as in said sections provided in the case of the doing of the act the accomplishment of which is the object of such conspiracy. * * *

STATEMENT

Petitioner and Anastase A. Vonsiatsky, Gerhard Wilhelm Kunze, Wolfgang Ebell, and Otto Willumeit were indicted in one count in the District Court for the District of Connecticut for conspiring, from on or about January 1, 1941, to on or about December 6, 1941, to communicate,

deliver, and transmit to the governments of Germany and Japan and to representatives of those governments, information relating to the national defense, with intent and reason to believe that the information would be used to the injury of the United States and to the advantage of Germany and Japan (R. ix-xiv). The defendants other than petitioner pleaded guilty (R. ii, 690). Petitioner was convicted after a trial before a jury (R. viii, 677) and was sentenced to imprisonment for ten years (R. viii, 679). On appeal, the conviction was unanimously affirmed (R. 724).

The Government's case may be thus summarized:

Vonsiatsky was the leader of the Russian National Revolutionary Party, which had for its purpose the overthrow of the present Russian Government and which published a Russian language newspaper called "The Fascist" (R. 4). He attended German-American Bund affairs and was often seen on such occasions and at his home near Thompson, Connecticut, with the defendant Kunze, Fritz Kuhn, and other leaders of the Bund, as well as with Japanese people (R. 3-4).

Kunze was born in the United States, but he became a citizen of Germany in November 1941 (R. 566). He was National Leader of the Bund (R. 89-90) and an acknowledged Nazi (R. 577).

Ebell is a physician who, from 1931 to the time of his arrest, practiced medicine in El Paso, Texas (R. 608-609). He was born in Germany

and served in the German army in the last war. He left Germany in 1927 and, after spending some time in Mexico City, where he represented a German laboratory, and in Monterrey, Mexico, he emigrated to the United States in 1930. (R. 607-608.) He was a member of the Bund (R. 618) and was associated with Kunze in its affairs (R. 609, 618). His United States citizenship was revoked in April 1942 (R. 610, 615). 44 F. Supp. 43 (W. D. Tex.).

Willumeit was a Chicago restaurateur (R. 91). He was born in Germany, came to the United States in 1925 and, after some study in Chicago, returned to Germany, where, in 1936, he was graduated in medicine from the University of Bonn (R. 88-89). He became an American citizen in 1931 (R. 106). He joined the Bund in 1937, and from 1938 until it was dissolved in 1941 he was the Chicago unit leader (R. 89).

Petitioner was the pastor of Old Zion Lutheran Church in Philadelphia. He was born and educated in Germany and served in the German army in the last war (R. 419-422, 423-424). In 1924 he was sent by the Board of Education of the United Lutheran Church to Susquehanna University in Pennsylvania and after a few months of teaching there he was called to the pastorate of a church in Johnstown, Pennsylvania (R. 424-426), where he served until 1929, when he accepted a call from Old Zion Church

(R. 391, 429). He was naturalized in 1940 (R. 430).

Aleksy Pelypenko, a Roman Catholic priest of the Ukrainian Rite (R. 5), testified that in 1937 he was assigned to Argentina as a missionary among the Ukrainian colony and that, while there, he furnished information to British intelligence authorities and the American Embassy (R. 5-6). In December 1940, he received from Prince Schaumburg-Lippe, the adviser of the Germany Embassy in Buenos Aires, a card bearing the prince's name and address for purposes of identification (R. 7, 43, 44). On March 24, 1941, at the suggestion of officials of the American Embassy in Buenos Aires, Father Pelypenko came to the United States; he was met by an agent of the Federal Bureau of Investigation, and from then until August 1941 he worked in contact with the Bureau (R. 6, 27-28). He first went to Chicago, where he met Willumeit in a Ukrainian restaurant (R. 7, 31, 90). Willumeit stated that he was a leader among German people in Chicago and was in contact with the German authorities (R. 32). The two met frequently thereafter (R. 33, 90-91).

In May 1941, Father Pelypenko visited the German consul in Philadelphia (R. 7-8) and, in response to his expressed desire to become acquainted with persons aiding German propaganda (R. 38), the consul gave him petitioner's name and address (R. 8); the consul described petitioner

as one of the "important co-workers" of the consulate (R. 38). When Father Pelypenko also asked the consul to get him in touch with the German Embassy, the consul said that it would be "more convenient" to make the contact through petitioner (R. 44-45). Shortly thereafter, Father Pelypenko visited petitioner, explaining that he had been directed to him by the consul (R. 37-38) and that he wished to be placed in contact with the Embassy (R. 8). Petitioner said that he knew Baron von Geinanth, but that the contact would have to be made through Pastor Evers of Baltimore, who, he said, was another "co-worker" "working with the Embassy" just as he was, and he gave Father Pelypenko the latter's address (R. 8-9; see also R. 23, 37). Father Pelypenko also asked petitioner what he thought about "the aid of the Ukrainians in the German aims," and petitioner said that Ukrainian aid "may be directed in three directions," first, by "propaganda against war and against the warring authorities in Washington"; second, by "propaganda amongst Ukrainians concerning independence of the Ukraine"; and third, by giving "information about factories and military equipment" (R. 9).

The following day Father Pelypenko visited Pastor Evers in Baltimore, after which he went to the German consul in that city, who gave him the address and telephone number of the Embassy in Washington (R. 9-10). The consul telephoned

von Haydn, the secretary of the Embassy, who asked that Father Pelypenko come to Washington. Father Pelypenko accordingly met von Haydn in a hotel in Washington and at their meeting petitioner was discussed (R. 10).

Early in July 1941, Father Pelypenko met Kunze at the Bund office in New York by means of a letter of introduction given to him by Willumeit (R. 11, 36, 90). In the latter part of the same month, at the invitation of Willumeit, Father Pelypenko met him and Vonsiatsky and Kunze at the Hotel Bismarck in Chicago (R. 10, 35, 91), the meeting having been arranged by the latter two a few days before (R. 91, 586). Vonsiatsky stated that he had just returned from San Francisco, where he was to have met a female Japanese agent coming in on the *Tatu Maru*, but that the ship had not arrived. He had prepared information for her concerning the location of the American Army, fleet, and aviation. It was agreed that because of her failure to arrive, this information, as well as additional information gathered by Kunze, Willumeit, and other "co-workers" concerning the military position of the United States, would be taken by Kunze to South America, whence he would try to go to Berlin. Kunze said that petitioner was his co-worker in Philadelphia and asked Father Pelypenko to visit petitioner there and work with him in obtaining a passport. Kunze agreed to write to petitioner concerning this matter and said that petitioner

would take care of everything. He also said that he was afraid to make the trip with an American passport through the English blockade and that he would prefer to have a Polish or Czech document which would enable him to go through as an ally. Kunze gave Father Pelypenko \$50 to aid in obtaining a passport. (R. 12-13, 22-23, 91-92, 95, 109, 622-623, 623-624.)

Father Pelypenko returned to New York after the meeting and a few days later he received a letter from Kunze stating that he had "written to Pastor M"² and enclosing two small photographs of Kunze (R. 13-14, 15; see also R. 23). The flap of the envelope bore the legend "K c/o Rev. Molzahn, Zion Luth. Church, Franklin Square, Phila., Pa." (R. 695). Father Pelypenko went to see petitioner in Philadelphia immediately after he received the letter, but was told at the church that petitioner was away on vacation, and so he left the two photographs for petitioner (R. 16). On his return to New York, Father Pelypenko received a second letter from Kunze, postmarked August 2, 1941, containing three larger photographs, and bearing a forward-

² This statement was admitted as evidence only that Kunze had written the statement and not as evidence that a letter to petitioner was written (R. 15). Kunze himself testified that he had in fact written to petitioner, though insisting that the letter did not contain instructions for the purpose of assisting Kunze to leave the country (R. 560-562). Petitioner's testimony was that he received no letter whatever from Kunze (R. 461-462, 458).

ing address in care of petitioner (R. 14, 15). Father Pelypenko again went to Philadelphia and, finding that petitioner was still away, left two of these photographs (R. 17).

Thereafter Father Pelypenko went to Thompson, Connecticut, to see Vonsiatsky. The latter told him that he was sending Kunze with important papers and requested him to assist Kunze in getting across the border; he said that because Father Pelypenko was a priest he could take things with him across the border and accordingly asked him to accompany Kunze (R. 19, 22). Vonsiatsky had previously given Kunze \$2,800 to finance the latter's trip through Mexico and thence to Berlin (R. 45, 144-145). Vonsiatsky also asked Father Pelypenko to visit the Japanese military attaché at the Embassy to ascertain the whereabouts of an important female Japanese espionage agent and told him to advise the attaché that Vonsiatsky's espionage system was so well organized that he could give full information about forces to Tokyo and Berlin within a few hours (R. 19-20). Father Pelypenko called on the attaché in Washington and was advised that it would take a few days to locate the agent in question. The attaché wished to know whether airplanes were being sent to Russia through Alaska and said that he would like to talk to Vonsiatsky personally. Father Pelypenko returned to Thompson and reported this to Vonsiatsky. (R. 20-21.)

About the middle of September 1941, Father Pelypenko saw petitioner in Philadelphia (R. 17, 19). Petitioner told him that he had received a letter from Kunze and had done "what he could" (R. 17). When Father Pelypenko displayed one of the letters he had received from Kunze with petitioner's address on the flap of the envelope, petitioner tore the address off and told Father Pelypenko "to be careful with it" (*ibid.*).³ He said that Kunze had been at his residence a few times, that Kunze was a good man but was a "dunce," because he had not been "very careful" (R. 18). Petitioner stated in connection with this letter that in his correspondence with Baron von Geinanth he had "had an unfavorable experience with the post office, because of the back address" (R. 18-19). Father Pelypenko asked petitioner how he could communicate with Kunze and petitioner gave him the address of defendant Ebell in El Paso (R. 18). Father Pelypenko stated that Kunze "expects to leave," and that "this business was very important, because he [Kunze] has with him important papers," and to both of these statements petitioner replied that he knew (*ibid.*).

Early in October 1941, Kunze and Willumeit made an extensive trip through the northwest United States, the Pacific Coast, and the south-

³ There was no dispute concerning the fact that the letters and envelopes displayed by Father Pelypenko were in the handwriting of Kunze (R. 14-15, 115).

west, visiting various units of the Bund (R. 95-101). Kunze displayed a thorough and complete knowledge of shipping facilities, naval bases, coastal fortifications, and possible invasion points, and their itinerary took them near and through harbors and docks, oil refineries, airplane factories, and various military installations (*ibid.*). In the course of the trip Kunze told Willumeit that he had knowledge of a certain device and that "he would do anything that this country would not get that" (R. 100). Upon their arrival in El Paso in the latter part of October they visited Ebell (R. 101). The latter was known to American and Mexican border officers, and he drove them to Juarez, Mexico, where they unsuccessfully sought to meet a brewmaster named Ferdinand Goeldner (R. 102-104, 563, 602, 610). Thereafter Kunze and Willumeit returned to Chicago via San Antonio, Houston, New Orleans, and St. Louis (R. 105). Early in November, Kunze returned to El Paso, crossed the border into Mexico, and reached Mexico City about November 11, 1941, where he remained until he was arrested and extradited in July 1942 (R. 54, 106, 564, 569, 601, 602, 605, 606). On December 8, 1941, Kunze wrote to Goeldner and Ebell from Mexico City, enclosing a letter from him to Vonsiatsky, which he asked Goeldner and Ebell to forward to Thompson, Connecticut, from El Paso;⁴ he also

⁴ The envelope containing this letter of December 8 was addressed to Goeldner in Juarez (R. 566).

requested that the reply to his letter to Vonsiatsky be forwarded from Juarez to "Kurt" (R. 145, 146-147; see also R. 563). In his letter to Vonsiatsky, Kunze stated that because of Pearl Harbor he could not go to Japan, that he would have to go "in another direction," that to cross the Atlantic by air would cost too much, but that he had "another method of travel," and requested Vonsiatsky to send him another \$1,000 via Ebell in El Paso (R. 145, 146). On cross-examination of Kunze it was brought out that at the time he was arrested by the Mexican police he had a boat lying in a fishing harbor in which he intended to cross the Atlantic (R. 567).

In January or February 1942 Father Pelypenko visited Ebell's office in El Paso at the address which petitioner had given him and was advised by Ebell's assistant that Kunze was in Mexico and that Ebell had taken him across the border (R. 24).

In addition to the foregoing, the Government introduced, as evidence of petitioner's intent and motive (R. 62), the testimony of one Flatter that he was a fellow passenger with petitioner on a voyage to Germany in 1937 (R. 61). Petitioner wore the Nazi party emblem aboard ship (R. 65, 66). Flatter had been discharged from the faculty of a German school in 1933 because of his opposition to Hitler and the Nazi party (R. 60-61, 80), and petitioner urged him to join the party and offered to assist him in reestablishing himself

(R. 66, 67-69). Petitioner stated that he was going to Berlin for conferences with "higher-ups" of the party and that he was a member of the party (R. 69). He gave Flatter a card of introduction to one Behrensmann, a Gestapo official (R. 67, 87), and suggested that Flatter call upon Behrensmann (R. 68).

In 1938 petitioner's bishop cautioned him to discontinue his friendly relations with one Kesemeier (R. 644), a notorious and active Nazi in Philadelphia (R. 227, 229, 246, 263, 279). In 1939 petitioner discussed with his bishop an invitation which he had received to return to Germany, and the bishop advised him that if he stayed in the United States he should become a citizen (R. 642-643). Petitioner stated that he "found it rather difficult to focus upon one supreme loyalty, having been a German so long and having relatives of his wife in England, and also having this home of his with his kiddies in America" (R. 644).

There was also evidence that petitioner spoke at several Bund affairs (R. 572-573)⁵ and that in 1934, shortly after a trip to Germany, he delivered a speech praising the present German regime (R. 532-541). In May 1942, when agents of the Federal Bureau of Investigation searched his home

⁵ The evidence was given by Kunze, a defense witness, and is in accord with testimony by Pastor Schlick, also a defense witness (R. 292-293), the truth of which petitioner denied (R. 479).

with his consent (R. 117), they found photographs of Hitler and Goebbels and a number of documents put out by German propaganda agencies (R. 118-121, 131-134).

ARGUMENT

I

We do not understand petitioner to contend that the conspiracy charged in the indictment was not proved, and, indeed, such a position could not be maintained, for the evidence indubitably showed the existence of the unlawful agreement. Rather, his position is that there was insufficient evidence to show that he knew of and participated in the conspiracy (Pet. 21-34). Petitioner's contention in this regard is pitched largely upon the thesis that Father Pelypenko's testimony concerning his conference with petitioner following the meeting in Chicago of Kunze, Vonsiatsky, Willumeit, and Father Pelypenko (see pp. 8-9, 11, *supra*), was the only evidence connecting or tending to connect petitioner with the conspiracy (see Pet. 27-32).⁶ But "the character and effect of a conspiracy is not to be judged by

⁶In connection with his conference with Father Pelypenko, petitioner correctly points out that the issue is largely one of veracity as between himself and the priest (Pet. 13, 15-16). This was a question for the jury. It is worthy of note that on the issue whether Father Pelypenko and petitioner had had a prior meeting, which petitioner denied (R. 442, 511-512, 515, 544), petitioner's assertions were refuted by documentary evidence (R. 7-9, 23, 159, 168).

dismembering it and viewing its separate parts, but only by looking at it as a whole." *Hamburg-American Steam Packet Co. v. United States*, 250 Fed. 747, 757 (C. C. A. 2), certiorari denied, 246 U. S. 662, and cases cited. We believe that viewing the evidence as a whole, with the inferences reasonably to be drawn therefrom, in the light most favorable to the Government (as we must, *Glasser v. United States*, 315 U. S. 60, 80), there was sufficient to permit the jury to resolve the issue of petitioner's guilt and to justify its conclusion.

At the meeting of Vonsiatsky, Kunze, Willumeit, and Father Pelypenko in Chicago, it was determined that Kunze should take the military information that Vonsiatsky and he had gathered to Berlin, and Kunze requested Father Pelypenko to visit petitioner in Philadelphia and work with him to secure a passport. Kunze said that he would write to petitioner concerning the matter. When Father Pelypenko saw petitioner after he had delivered Kunze's photographs to petitioner's church, petitioner acknowledged that he knew Kunze expected to leave and that Kunze had with him important papers. Petitioner told Father Pelypenko that he had received a letter from Kunze and had done "what he could." This evidence, although not decisive, was at least sufficient to warrant the inferences, which the jury evidently drew, that petitioner knew of the existence of the conspiracy and that he had done some-

thing in an effort to obtain a passport for Kunze and thus actively participated in the furtherance of the unlawful scheme. What he did and the success of his efforts are entirely immaterial, for if he joined in the conspiracy he is equally punishable with the rest, even though he may have done nothing in execution of its purpose, so long as one of the conspirators committed an overt act. *United States v. Rabinowich*, 238 U. S. 78, 86; *Bannon v. United States*, 156 U. S. 464, 468.

Nor was this the only evidence of petitioner's guilty knowledge and participation. He knew Kunze's prospective whereabouts, for he told Father Pelypenko that Kunze could be reached in care of Ebell in El Paso. Moreover, with no hostile motive, Kunze used petitioner's office as a forwarding address in his communications to Father Pelypenko. Inculpatory also was petitioner's action in taking from Father Pelypenko the flap of the envelope which contained Kunze's letter and photographs and which bore petitioner's name and address, and his criticism of Kunze for indiscretion in that regard. In addition, his advice to Father Pelypenko that German aims could be aided by giving information about factories and military equipment, the evidence of his connection with the German Embassy and consulate, the consul's designation of him as an important co-worker, and his selection by Kunze, who also described him as a co-worker, to aid in obtaining

a passport, all support a finding of a close connection with the conspiracy.

The Government's case, it is true, depends in large part upon a collocation of circumstances tending to sustain the inferences necessary to support the verdict. But, indeed, a conspiracy is often susceptible of proof in no other way. *United States v. Manton*, 107 F. (2d) 834, 839 (C. C. A. 2), certiorari denied, 309 U. S. 664. It is settled, too, that when a conspiracy is established, as it was here, only slight quantitative evidence connecting a defendant with it may in the circumstances be substantial and, therefore, sufficient to warrant submission to the jury of the issue of the defendant's guilt. *Meyers v. United States*, 94 F. (2d) 433, 434 (C. C. A. 6), certiorari denied, 304 U. S. 583; *Marx v. United States*, 86 F. (2d) 245, 250 (C. C. A. 8); *Galatas v. United States*, 80 F. (2d) 15, 24 (C. C. A. 8), certiorari denied, 297 U. S. 711. As the issue of petitioner's knowing participation in the conspiracy was submitted to the jury under instructions which were eminently fair and correct (R. 667, 670, 671, 673-674, 675),⁷ no sufficient reason appears why the concurrence of the jury, the district judge (see R. 678-679), and the circuit court of appeals as to the sufficiency of the evidence should not be ac-

⁷ The trial judge iterated throughout his charge that before the jury could convict they must find that petitioner had knowledge of the purpose of the conspiracy and that he intentionally participated in it (*ibid.*).

cepted as final. *Delaney v. United States*, 263 U. S. 586, 589-590.*

II

Petitioner's contentions that the trial court erred in admitting certain evidence likewise present no question for further review.

(a) Petitioner argues (Pet. 35-37) that the testimony of Flatter concerning his conversations with petitioner during the voyage to Germany in 1937 (see pp. 13-14, *supra*) was inadmissible, both because there was no connection between petitioner's statements at that time and the alleged conspiracy in 1941, and because as evidence of petitioner's state of mind his statements had no probative value in the absence of proof that he did some act in furtherance of the conspiracy. This testimony, however, as well as other evidence of similar statements made by petitioner prior to 1941 (*supra*, p. 14), was clearly admissible to show his intent, motive, and state of mind.⁹ All these statements

* There is no merit in petitioner's further contention (Pet. 32-34) that Father Pelypenko's testimony concerning petitioner's admissions was not corroborated and was therefore insufficient to take the case to the jury. As the court below said (R. 700), the admissions were made during the course of the conspiracy, not after the completion of the crime, and therefore corroboration was not required. *Warszower v. United States*, 312 U. S. 342. However, if it be necessary, corroboration is found in the other evidence which we have summarized above and in the Statement, *supra*, pp. 6-15.

⁹ In his instructions, the trial judge correctly told the jury that the testimony as to petitioner's actions and statements at the time of he voyage in 1937 could be considered only as

disclose a continuing and persistent attitude of sympathy with and responsiveness to the interests and aims of the Nazi party and the German Reich. The testimony complained of did not concern a single, isolated expression of petitioner's attitude, but was only one item of evidence showing a purpose which culminated in his participation in the conspiracy. See *Debs v. United States*, 249 U. S. 211, 215; *Williamson v. United States*, 207 U. S. 425, 451; *Allis v. United States*, 155 U. S. 117, 119; *Wood v. United States*, 16 Pet. 342, 360-361; *Viereck v. United States*, 130 F. (2d) 945, 959-960 (App. D. C.), reversed on other grounds, March 1, 1943, No. 458, this Term; *United States v. Pelley*, 132 F. (2d) 170, 180-181 (C. C. A. 7), certiorari denied, February 15, 1943, Nos. 645-647, this Term; *Schoborg v. United States*, 264 Fed. 1, 7 (C. C. A. 6), certiorari denied, 253 U. S. 494; *Howenstine v. United States*, 263 Fed. 1, 5-6 (C. C. A. 9); *Stenzel v. United States*, 261 Fed. 161, 162 (C. C. A. 8); *Shidler v. United States*, 257 Fed. 620, 623 (C. C. A. 9); *Herman v. United States*, 257 Fed. 601, 603-604

bearing upon his state of mind during the period of the alleged conspiracy, and that it was for them to determine whether his actions during that period were done with intent to carry out the purpose of the conspiracy (R. 672, 674-675). Cf. *Shidler v. United States*, 257 Fed. 620, 623 (C. C. A. 9); *Herman v. United States*, 257 Fed. 601, 603-604 (C. C. A. 9), certiorari denied, 251 U. S. 558; *Coldwell v. United States*, 256 Fed. 805, 811-812 (C. C. A. 1), certiorari denied, 250 U. S. 661.

(C. C. A. 9), certiorari denied, 251 U. S. 558; *Coldwell v. United States*, 256 Fed. 805, 811-812 (C. C. A. 1), certiorari denied, 250 U. S. 661; *Kirchner v. United States*, 255 Fed. 301, 304-305 (C. C. A. 4), certiorari dismissed, 250 U. S. 678. Furthermore, the trial court has discretion in the admission of evidence which discloses intent (*Glasser v. United States*, 315 U. S. 60, 81-82; *Partridge v. United States*, 39 App. D. C. 571, 576), and a wide latitude is permitted when it is an important element of an offense. *Hallock v. United States*, 185 Fed. 417, 424-425 (C. C. A. 8), certiorari denied, 220 U. S. 613; cf. *Williamson v. United States*, 207 U. S. 425, 451.

(b) Petitioner also complains (Pet. 37-39) that it was error to admit the testimony of Father Pelypenko and Willumeit as to the conversations at the meeting at the Bismarck Hotel in Chicago of Kunze, Vonsiatsky, Willumeit, and Father Pelypenko (see pp. 8-9, *supra*); he argues that this testimony was hearsay as to him and that it was offered to prove his connection with the conspiracy. However, as the court below held (R. 699-700), there was proof *aliunde*, to which we have already adverted (*supra*, pp. 16-18), of petitioner's knowledge of and participation in the conspiracy, and the statements were therefore competent evidence against him. *Glasser v. United States*, 315 U. S. 60, 73-74; *United States v. Manton*, 107 F. (2d) 834, 848 (C. C. A. 2), certiorari denied, 309 U. S. 664. And while the

proof indicates that petitioner joined the conspiracy after its inception, the evidence was nevertheless admissible against him, for it is settled that one who joins a criminal conspiracy becomes equally guilty as those who participated at its formation and is equally accountable with the original conspirators for the acts done and statements made prior to his membership. *United States v. Manton*, *supra*; *Marino v. United States*, 91 F. (2d) 691, 696 (C. C. A. 9), certiorari denied *sub nom.* *Gullo v. United States*, 302 U. S. 764; *McDonald v. United States*, 89 F. (2d) 128, 133 (C. C. A. 8); *Laska v. United States*, 82 F. (2d) 672, 677 (C. C. A. 10), certiorari denied, 298 U. S. 689; *Baker v. United States*, 21 F. (2d) 903, 905 (C. C. A. 4), certiorari denied, 276 U. S. 621; *Van Riper v. United States*, 13 F. (2d) 961, 967 (C. C. A. 2), certiorari denied *sub nom.* *Acker-son v. United States*, 273 U. S. 702.¹⁰

(c) Finally, petitioner contends (Pet. 39-40) that Kunze's letters of December 8, 1941, written in Mexico, the first to Ebell and Goeldner, and the second to Vonsiatsky (see pp. 12-13, *supra*), were improperly admitted because at that date the conspiracy had terminated. A mere reading of the

¹⁰ In respect of this contention it should be noted that the trial judge specifically instructed the jury that evidence as to acts and statements of the other conspirators outside of the presence of petitioner could be considered against him only if the jury found from the evidence concerning his own acts and declarations that he had knowledge of the conspiracy and intentionally participated in it (R. 673-674).

letters (R. 146-147) indicates otherwise. The letter to Vonsiatsky shows that Kunze's trip was still in contemplation, the object of the conspiracy still pending, and he asked Vonsiatsky to send him via Ebell in El Paso an additional \$1,000 for expenses. The letter to Ebell and Goeldner requested them to forward the letter to Vonsiatsky and to forward the latter's reply with the money to "Kurt." Manifestly, these letters were written in execution of the conspiracy to communicate, deliver, and transmit information relating to the national defense to the governments of Germany and Japan, as alleged in the indictment, and they were, therefore, properly admitted.¹¹

In connection with the letter to Ebell and Goeldner, petitioner also complains (Pet. 40-43) that the reference in it to "Kurt," and the manner in which the prosecutor read the letter to the jury, was prejudicial, because the jury may have inferred that the person referred to was he. The defense later, however, proved through Kunze that the "Kurt" referred to in the letter was one Kurt Tuermer, a friend of Kunze's in Mexico City whom he visited during his stay there (R. 563-564), and, in addition, the defense read into evidence a translation of the postscript which was appended to the letter and which was written by

¹¹ The indictment alleged that the conspiracy continued to on or about December 6, 1941 (R. ix). However, the offense charged being a continuing one, the Government was not bound by the specific date alleged. *Ex parte Montgomery*, 244 Fed. 967, 970 (S. D. N. Y.), affirmed, 246 U. S. 656.

Tuermer to Ebell and Goeldner (R. 604-605). The defense did not, either at the time the prosecutor read the letter to the jury (see R. 147) or when they proved that the "Kurt" referred to was Tuermer (see R. 564, 602, 605), ask that the reference to "Kurt" be stricken or that the jury be instructed that petitioner was not the person referred to. As the court below said (R. 702), any inference that petitioner was connected with the proposed forwarding of money from Vonsiatsky to Kunze in Mexico was so thoroughly disproved that the reference to "Kurt" cannot be regarded seriously.

III

Petitioner contends (Pet. 51-59) that he was entrapped into the conspiracy by the actions of Father Pelypenko. This Court has held that the question of entrapment is one for the jury. *Sorrells v. United States*, 287 U. S. 435. While the question was raised as a ground of petitioner's motion for a directed verdict at the close of all the evidence (R. 662-663), there was no request to instruct the jury in respect of this claim and no exception to the court's charge (R. 676-677). Moreover, although petitioner assigned as error the denial of his motion for a directed verdict, the assignment was predicated upon the asserted insufficiency of the evidence (R. xxiii-xxiv) and nowhere in the assignments of error was the matter of entrapment mentioned (R. xxi-xxiv).

Hence, no such issue was presented to or considered by the court below. The contention therefore appears to be not now open to petitioner. Cf. *Sonzinsky v. United States*, 300 U. S. 506, 514.

In any event, the contention is lacking in substance. Entrapment consists essentially of instigation by Government agents of the commission of a crime. *Sorrells v. United States*, 287 U. S. 435, 451, 454; *Poliski v. United States*, 33 F. (2d) 686, 687 (C. C. A. 8), certiorari denied, 280 U. S. 591. There is not the slightest evidence that Father Pelypenko induced petitioner's participation in the conspiracy. The German consul first referred Father Pelypenko to petitioner as an "important co-worker" of the consulate, and at his first meeting with petitioner in May 1941 Father Pelypenko asked petitioner's views as to how the Ukrainians could aid German aims and requested petitioner to place him in contact with the German Embassy. Father Pelypenko was invited to the meeting at the Hotel Bismarck in Chicago by Willumeit, one of the conspirators. Father Pelypenko and Willumeit both testified that it was Kunze, not Father Pelypenko, as petitioner suggests (Pet. 54), who brought up the matter of having petitioner secure a passport (R. 12, 23, 92, 95). Father Pelypenko was to act as an intermediary between Kunze and petitioner, and Kunze stated that he would write to petitioner regarding the passport (R. 12, 22-23, 92, 95, 109). When Father Pely-

penko visited petitioner in Philadelphia some weeks later, petitioner volunteered the information that he had received a letter from Kunze and had done what he could, and he stated that he knew Kunze expected to leave with important papers. The evidence thus shows that petitioner's decision to participate in an illegal conspiracy was not implanted in the mind of an innocent person by a Government officer. Father Pelypenko merely feigned the part of an accomplice and his conduct furnishes no basis for the claim that he ensnared petitioner into the conspiracy. See separate opinion of Mr. Justice Roberts in *Sorrels v. United States*, 287 U. S., at 453-454.¹²

CONCLUSION

Petitioner had a fair trial and his conviction is supported by the evidence. No question is pre-

¹² Petitioner's general assertion (Pet. 61-64) that he did not have a fair trial because of his German birth and an atmosphere of "war excitement" pervading the courtroom, is insubstantial. At the very outset of his charge the trial judge directed the jury at length that it was their duty, and the court's, to render even-handed justice without passion or prejudice, that the rights of all persons before the law must be protected, regardless of the place of their birth, that patriotism must not be allowed to cloak injustice, and that the jury must determine petitioner's guilt solely on the evidence (R. 664-665). In respect of petitioner's general attack upon the fairness of the trial, the court below, upon a careful examination of the whole record, found "the conduct of the trial not only fair but scrupulous to protect the defendant's rights and unusually competent" (R. 702-703).

sented which warrants review on certiorari. The petition should therefore be denied.

Respectfully submitted.

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